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No. 89

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

GEORGE STORY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether repeated and varied acts of prosecutorial misconduct that occurred at all stages of the trial was plain error and denied the petitioner his right to a fair trial?

2. Whether the trial court committed error by precluding the testimony of two defense witnesses on the basis of Rule 608(b), Federal Rules of Evidence?

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Petitioner George Story respectfully requests that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit embodied in its order filed on October 19, 1989. The lower court's order affirmed Story's conviction of one count of conspiracy to distribute cocaine in violation of 21 U.S.C. Section 846. Story is presently serving a 4 year term of imprisonment.

OPINION BELOW

The unpublished order of the Court of Appeals is reprinted in the Appendix to this petition, *infra*, 1a-3a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. Section 1254(1) to review the judgment of the Court of Appeals filed on October 19, 1989.

RULE INVOLVED

Federal Rules of Evidence:

Rule 608(b)

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.

STATEMENT OF THE CASE

The petitioner George Story was tried in the U.S. District Court for the Northern District of New York in two counts for a substantive narcotics charge (Count 2) and a conspiracy so to do (Count 1) in violation of 21 U.S.C. Sections 841(a)(1) and 846. The jury convicted Story of the conspiracy but acquitted him of the substantive count.

At trial, the prosecutor violated almost every standard of conduct imposed by this Court and the Circuit Courts. Among the

occurences were: the prosecutor's insertion of his own credibility in questioning witnesses and in summation; the introduction of evidence and comments made in summation that led one to believe there was more to Story's crimes than proved at trial; and a summation that appealed to the jury's emotions and misstated facts. The proof was far from overwhelming and was largely dependent upon the credibility of impeached and biased witnesses.

The substantive count rested on the testimony of 3 witnesses: Steven Sabo, Saul Goldman and Linda Doyle. The credibility of each of them was substantially impeached and each was shown to have biases either against Story or for the Government. Sabo had been a user and seller of drugs for numerous years; he had numerous criminal convictions; he had been indebted to and defaulted on loans made by Story; and he had entered into an agreement to work as an informant for the Government in return for its assistance in resolving 2 outstanding local felony charges. Goldman was also a user and distributor of drugs; he was also indebted to and defaulted on loans made by Story; and he had a cooperation agreement with the Government. Doyle also used drugs and was a spurned lover of Story.

The gist of the Government's proof on the substantive count was that in mid 1983 Story provided Goldman with cash and a contact in Naples, Florida, from whom Goldman was to buy a pound of cocaine and return it for distribution in the area of Albany, New York. Goldman made the trip, purchased the drug and returned it to upstate New York where it was sold over several months in ounce quantities through Sabo and another. The cash receipts from the sales were turned over by Sabo and Goldman to Story. Doyle corroborated the testimony of Sabo and Goldman by her testimony that during the relevant period Story had supplied her with user amounts of cocaine on several occasions. She also testified that Story had solicited her to travel to Florida with his cash to purchase $20,000 worth of cocaine.

The defense, in addition to showing further impeachment and bias of these 3 witnesses, consisted of Story's testimony denying the charge.

After deliberating over 2 and a half days in a case that had taken 5 days to put in the total proof, the jury acquitted Story of the substantive count. The credibility and biases of the 3 witnesses were obviously important factors to the jury.

The conspiracy alleged three objectives, the first of which was the underlying substantive count. The third objective consumed almost all of the Government's direct case. It alleged an agreement to distribute 10 kilograms of cocaine that occurred from November, 1987, through January, 1988. The Government's case rested on the testimony of Sabo and 3 co-conspirators: Curt Jones, Marvin Lightner and Mark Hendry. It also rested on 49 recorded phone conversations Sabo had with Story and the 3 co-conspirators.

The credibility of each of the co-conspirators was substantially impeached. All three had been convicted of prior crimes. All three also pleaded guilty to the conspiracy count. Lightner and Hendry were Government informants during the events of November through January, 1988, and failed to live up to their agreements by not revealing the events of that period. And, Lightner and Hendry had cooperation agreements with the Government in return for their testimony and thereby had a bias to favor the Government.

The gist of the third objective of the conspiracy arose from Sabo's attempt, while acting as a Government informant, to purchase 10 kilograms of cocaine. His "cover story" was that he represented a "businessman" with excess cash who wanted to buy the drug in Florida but who would only pay C.O.D. in upstate New York. On November 12, 1987, Sabo met Story and in an unrecorded converstion told Story he wanted to buy 2 kilograms of the drug for the "businessman". At Sabo's request, Story called Jones in Naples, Florida, and relayed Sabo's request. After the call, Story told Sabo that Jones did not see a problem and would call Story with more details. Before concluding the meeting, Sabo asked Story to ask Jones if 10 kilograms could be obtained. Sabo testified that Story used code when he spoke of the cocaine in his phone conversation with Jones. Jones testified Story did not use code.

Sabo and Story spoke by phone on 3 occasions on November 16, the thrust of which was that Story and Jones had spoken and the latter had suggested that Sabo travel to Naples. In the last of these calls, Story gave Sabo Jones' phone number so both could talk directly. Jones and Sabo did that same day and Jones was unaware that Sabo wanted 10 kilograms but believed Sabo wanted 2 as he had learned from Story. Jones informed Sabo that he had 2 sources (Lightner and Hendry) and he did not know the cost of the drug but would learn it and call Sabo.

Jones contacted Lightner who initially could be of no help and who suggested that Jones meet Hendry. He did so and Jones and Hendry called Sabo on several occasions concerning details of a purchase. Cost of the drug and of transportation to New York was discussed. Hendry also told Sabo that he would have to travel to Naples and pay for the drugs there. Sabo refused, suggesting he travel to Naples and show his cash with payment to occur C.O.D. New York. That proposal was unacceptable to Hendry. Matters stood there until Jones and Hendry called Sabo with an alternate proposal. They suggested that Sabo travel to Naples, buy a few kilograms and mark the balance of the ten which would then be shipped to New York. Upon Sabo's return to New York, he was to give the cash for the balance of the drug to Story who would hold it until Sabo received the balance. Jones told Sabo that he had not discussed this proposal with Story. Sabo stated that he would discuss it with the "businessman" and asked Jones to discuss it with Story.

In a subsequent phone call, Jones told Sabo that Story had agreed to hold the money. However, Jones' testimony was quite different. He testified that Story was not definite but ambivalent on his role as a stakeholder. Jones testified that he had assumed that Story would do it. Sabo himself called Story on this score and Story told Sabo: "I guess so. I don't know." Sabo and Story met on November 24 to discuss the stakeholder role and their conversation was unrecorded. Sabo testified that Story wanted $50,000 to do that but Sabo was only willing to pay $10,000. Sabo also testified that an amount was not finalized but would be when the drug connection was made. (Story's version was starkly different).

Thereafter, Sabo maintained phone contact with Jones who suggested Sabo travel to Naples to meet Lightner to buy some of the drug. Sabo and an undercover officer posing as the "businessman" travelled to and were in Florida from December 7-10 but Lightner was out of town. Through Jones, they met Hendry who was unable despite some effort on his part to arrange a kilogram sale. Hendry, however, had 4 ounces of the drug and offered it to the officer who rejected it.

After Sabo returned to New York, he called Story and recounted his unsuccessful trip to Naples and offered his graphic view of the incompetence of Jones and Hendry. Story was aware of the events in Naples from a conversation he had with Jones but told Sabo that he could be of no help. Sabo, with Jones' help, had several phone conversations between December 15-17 with Lightner concerning the purchase of the 10 kilograms. Lightner stated that a kilogram cost him $17,000 and he wanted to make a profit. He asked Sabo how much Jones would receive and Sabo responded "nothing". Lightner then stated that Sabo would have to pay $19,000 in Naples and that nothing would be shipped C.O.D. New York. Sabo suggested he buy one in Naples and then have 2 sent C.O.D. New York. Lightner rejected Sabo's proposal but made a counter offer - if 10 kilograms were bought in Naples, the price would be $17,000 per kilogram. Sabo stated the "businessman" would do so but wanted a firm price and date to meet. Lightner promised to call back ". . . with a positive on everything". The call never came.

Meanwhile, on December 17, Lightner met Jones and placed a call to Story. He told Story that when Sabo and the "businessman" were in Naples, they were "awful jumpy". He asked Story if they were "the law". According to Lightner, Story commented he knew Sabo who had worked for him in the oil business but did not know the "businessman". Lightner also testified that Jones at the December 17 meeting told Lightner that he and Story would split $10,000 after the sale occurred. Hendry offered similar testimony of a conversation he had with Jones. Jones denied making such a statement and further testified that Story never asked him for money.

Finally, a business acquaintance (Jean Humphries) of Story met with him in January, 1988, and in a discussion as to how she intended to earn a living in the future, Story commented that the way people now make money is by dealing drugs. She did not view his statement as an offer to do so.

In his defense, Story testified to a long and varied business relationship with Jones. It included an oil rights exploration business and joint ownership of realty and thoroughbred horses, one of which (Scenic Regal) was a world class trotter. He considered Jones a friend. Jones testimony was consistent.

Story testified Sabo and Jones met in the summer of 1987 and Sabo told Story he was to go to Naples to meet Jones. He did not then know but suspected that Sabo intended to do a drug deal there since Story learned in the early 80s that Sabo was a dealer and since that was all Sabo spoke about whenever they met. His suspicion was firmed up by November, 1987. He conceded the accuracy of his recorded phone calls. He conceded he talked to Jones about Sabo wanting a kilo or two of drugs and relayed Jones' message to Sabo to "go on down". But, he testified that Jones knew that fact and Jones may have called him when he relayed that data. Story conceded the November 24 meeting with Sabo, but testified that he intended to keep for himself the money Sabo wanted him to hold since Sabo owed him $100,000 on defaulted mortgages. When he learned it was the "businessman's" money, he refused to hold it and told Sabo he wanted no part of the transaction. He also told Sabo that fact in other unrecorded calls with him. He stated that Sabo had spoken to him at least 20 times about the drug deal prior to the initial recorded call. He denied he had a financial interest in the drug deal.

One other aspect of the defense case is relevant to this petition. As noted, Sabo met Story on November 12 and 24 and had the unrecorded conversations described above. Sabo claimed he did not wear a "wire" at these meetings since he feared its detection by Story because of the way Story normally greeted him. On cross, Sabo denied ever wearing a "wire" or even seeing one and that no recording device was in his car. Sabo admitted on

his direct that he was arrested on November 15 by local officers while he was acting as a Government informant. (This arrest was one he had sought Government assistance to resolve). He sought to obtain his release from custody by calling his police contact who, according to Sabo, was of no assistance.

The first 2 defense witnesses were the officers who arrested Sabo on November 15. The Government objected to their testimony and at the sidebar defense counsel made an offer of proof: the officers would testify that when arrested Sabo had a "wire" on his person. Moreover, Sabo told the arresting officers he was working on a drug deal for the Drug Enforcement Agency (DEA) and demanded to see a local investigator (officer Eggleston), according to the offer of proof. Sabo's purpose was to "undo" the arrest or use his cooperation to be released. The trial court precluded the proof on the basis of Rule 608(b), Federal Rules of Evidence. Defense counsel also argued that the proof was admissible to show bias - Sabo's reliance on Government assistance to assist on his local criminal charges. The trial court still precluded the proof.

During the trial, the prosecutor bolstered or denigrated the credibility of witnesses by inserting his own credibility into the case while questioning them. He also elicited personal facts about himself that could only have enhanced his personal standing with the jury.

The cross examination of the Government's first witness, Goldman, sought to show his proof was a recent fabrication by establishing whether he had told anyone of the Naples trip prior to his cooperation with the Government. On re-direct, the prosecutor referred to a meeting he and Goldman had pre-trial and the following was asked:

"Q. What did I say to you concerning your testimony?
Mr. McMahon: Objection.
The Court: Overruled.
A. Went over the testimony only that, to verify the truthfulness of its content.

Q. Did I tell you what to say?
A. No.
Q. What did I say to you?
A. Not to perjure myself . . .
Q. Did we meet briefly again this morning?
A. Correct."

Cross of Lightner challenged the December 17, 1987 call to Story by showing that it was unrecorded, made from a pay phone and no record of it existed. Lightner first told the DEA of it in October, 1988. On re-direct his credibility was bolstered:

"Q. Mr. Lightner, the first time you said you met someone in October, with DEA, was I present when we met in October?
A. Yes sir, you were.
Q. Was that the first time we had met, because your attorney had agreed through me, that you would testify at this trial or any trial?
A. Yes sir.
Q. And at that time did you make any statements to me concerning a phone call on December 17th to George Story?
A. Yes sir, I did.
Q. Was that the first time we met, you told me about that phone call?
A. Yes, sir.
Q. And was Special Agent Sears present when you told me about that?
A. Yes."

The same tack occurred repeatedly with Jones to attack his credibility in view of his relationship with Story and of his trial testimony. The more Jones was believed, the less was Story involved in the conspiracy. For example, Sabo testified Story used code when he spoke to Jones on November 12; Jones said code was not used. Sabo testified he told Story on November 12 that he wanted to buy 10 kilograms; Jones testified he first learned of the 10 kilograms not from Story but from Sabo. Jones testified he did not tell anyone he would split $10,000 with Story;

Ligthner and Hendry claimed he did. The prosecutor's attack on Jones' credibility even occurred on marginally relevant areas. And, what emerges from the following excerpts is that Jones' credibility was attacked by the only unsworn witness in the case — the prosecutor. Moreover, during its deliberations, the jury requested and heard all of Jones' testimony so the attack was before it a second time. It began on Jones' direct when he was asked about Scenic Regal's 1987 winnings and a trip Story, Jones and others made with the horse to Scandanavia in September, 1987. The following occurred:

"Q. Well how much did you get out of the winnings?
A. I don't remember without looking.
Q. Did you tell me previously that she won at least a quarter million dollars in '87?
A. I'm not sure if she won all that . . . ."

"Q. Who did the horse race against?
A. I don't know, horses from . . . different countries.
Q. Did you tell me the horse raced against a horse from Russia?
A. Yeah. There was horses from Russia and all over.
Q. Did you also tell me that you shared the same stable as the people from Russia?
A. Yes.
Q. And in that same conversation, did you tell me that Scenic Regal paid $250,000?
A. Yes. That's what one of our agents told me, that he made that much. I am not exactly sure. It could be $750,000 as of now. I'm just going by what he said.
Q. You didn't tell me that an agent told you that, did you?
A. I think, no — I'm sure that I did tell you that that's what he had told me.
Q. Did you tell me that you made $60 - or $70,000 as your share of the profits?
A. Yes, I said I thought it was somewhere around that neighborhood."

On direct, Jones was unsure if Story or Sabo told him of the background of the "businessman" (a man in the tire business in upstate New York). Jones could only recall he knew the background but could not recall who told him. The following occurred on direct and caused Jones to change his testimony:

"Q. Do you remember telling me that you were told that by Story in the initial phone conversation?
A. That very well could be. I just don't remember that at this time.
Q. Did you remember it when you told me?
A. Yes. I said you very well could be right. I just –
Q. Well, now do you remember telling me about it?
A. Yes. I remember us talking about it.
Q. Do you remember Story telling you that?
A. The best I can recall, I guess it was George that told me that.
Q. Well, we don't want guesses?
A. It was George.
Q. The first thing I told you, Mr. Jones, you can't guess on the witness stand.
A. It was George who told me that."

On re-direct, the prosecutor insinuated Jones had told him that Jones was to split the $10,000 with Story and further denigrated his credibility by eliciting Jones' need to have his lawyer present at pre-trial preparation:

"Q. Did you ever have conversations with George Story where you told him during these transactions that you were going to get $10,000 out of it and you and he would split the $10,000?
A. Never said for a fact that I said I was going to get, receive money. I never said that I would split that.
Q. Did you ever tell anybody that you told . . . Story that . . . you and Story agreed to split $10,000?
A. I don't believe that I did . . . .
Q. You said you were, you talked to me at length in the office; in fact, a number of those conversations your lawyer was present, wasn't he?
A. Two of them I believe he was, yes.

Q. Before you would talk to me at anytime, you had to confer with your lawyer, didn't you?
A. That's right . . . he told me to . . . ."

In two other instances on re-direct, Jones was asked these "me" type questions.

The prosecutor added his credibility to the Government's investigation. On Sabo's re-direct, he established that "I becamed involved" in the investigation in November, 1987.

Story's mother, a defense witness, testified on behalf of Story. She was once a high school guidance counselor and gave information on his background, including the school he attended. At one point defense counsel asked:

"Q. Did anyone else in this courtroom go to that school system?
A. Yes; John McCann [the prosecutor].

Mr. McCann: That's me Judge. Let the record reflect that I know Mrs. Story and have known her for a number of years.

The Court: Fine."

Defense counsel's comment may have justified the prosecutor's response. But, what occurred on cross was overkill and elicited personal facts that had no business in the case:

"Q. Mrs. Story, just so the Jury is fully aware of all the circumstances, I actually went to St. Mary's Academy, not Hudson Falls in high school, didn't I?
A. Well, you transferred on my recommendation to your father.
Q. You knew my father very well, didn't you?
A. Yes; I did . . .
Q. Did you work in his office?
A. No.
Q. I thought you did. Did there come a time —you never worked in my father's office?

A. Not that I know of, John. . . .
Q. He was a physician in town, just so the Jury understands that. So you have known me for a number of years.
A. Right. . . .
Q. And so the Jury understands, my father passed away a number of years ago . . .
A. Right."

The prosecutor elicited testimony to show Story's "drug dealing" extended beyond the proof. On Sabo's re-direct it was elicited that Sabo did not tell his police contact (officer Eggleston) about Story but that Eggleston mentioned his name to Sabo. The same occurred on the direct of a rebuttal witness (officer Morency). Although the examination was brief, it was used powerfully in both of the prosecutor's summations. In the initial summation it was argued:

> "The . . . Police and Sabo didn't set up Story. Remember what the testimony was . . . Eggleston knew of . . . Story's drug trafficking prior to Sabo agreeing to work with him; remember Morency, the small town cop . . . he had heard about Story's transactions and eventually relayed it to the State Police . . . But they had knowledge before he came in."

In rebuttal, it was argued:

> " . . . If the Government orchestrated this . . . if we orchestrated every bit of the events, if we orchestrated the phone conversations, then there is nothing wrong with doing that. We set Story up. The Government, through the State Police, knew about Story's involvement. We had known about Goldman. All they did was target who they believed to be a known drug trafficker, an individual who was laundering drug proceeds."

Capitalizing on loans Story made to Sabo and Goldman, the prosecutor argued in rebuttal:

> "They say the method of laundering the money through loans. It's completely secret between you and the individual you are borrowing from. It's a pattern specifically for drug dealers, or those involved in the drug . . . trade to launder their money, because it comes back legitimate."

The prosecutor's summation contained a strong emotional appeal to the jury, contained statements of personal belief and contained misstatements of fact.

The emotional appeal began moments into the prosecutor's intial summation. The proof, it was argued, established: "greed, money and deception" and that "Story profits from the misery of others." The case was then described as a "classic drug deal" (words used several times by the prosecutor) and Story was described as an exploiter of the drug using Government witnesses, all of whom put the profits from the drug trade "up their noses." The latter comment was repeatedly used. For example, it was argued that Jones - "Story's close friend, his rich friend" with the "super rich daddy" — it went "up his nose." But, Story avoided putting the "enormous" profits "up his nose" and did not "dirty" himself by possessing drugs. He made the profits — "tax free." This argument was repeated toward the summation's end. It emphasized that Story profited "off the misery of others" and that he had the sense to avoid drug use "but not enough decency" to eschew the profits from drug dealing.

In addition, it was argued that Story exploited his former paramour Doyle by giving her drugs for sexual reasons. Moreover, the travel and entertainment he accorded his "mistresses" (Doyle and a defense witness) was compared to the lack thereof accorded his former wife (also a defense witness).

The final emotional appeal was that Story was rich. The argument was made in the guise that Story had made a lot of money in his drug dealings (supported only by the unproved evidence and comments reported above). But, the thrust was clear - to create hostility in the jury against this wealthy man. As an

example, it was argued: "How many of you [the jury] have a racetrack on your personal farm"?

The prosecutor also inserted his credibility into the case. When initially discussing the conspiracy count, he stated: "I believe we have shown that, beyond a reasonable doubt, that Story conspired with his other defendants in a co-conspiracy." In his rebuttal summation, he argued Lightner and Hendry were credible with the following irony: "Now, he may be able to fool me, I have only been a prosecutor for 14 years", stating that they had not fooled the trial court and were, thus, credible.

The prosecutor misstated facts in summation and referred to facts not in evidence. For example, Humphries testimony (Story said to her that people make money these days by dealing in drugs) was changed. It became, on two occasions in summation, the only way "he" [Story] knew how to make money was from drugs. It was also argued that Story used drug money for a lavish lifestyle which included constructing barns and a racetrack on his farm. Story's former wife testified that Story had bought the farm in the 70s and deeded it to her when they separated, well before the events alleged in the indictment. She financed the improvements on it. It was also argued that Story hid all his property and had none in his name. That was contrary to the testimony. The prosecutor also argued that Story used the word "snow" as code for cocaine at a particular meeting in a motel during the course of the conspiracy. In addition, Story it was argued arranged a sham marriage between a prostitute and a foreigner. There was no such proof as to the code "snow" or as to the sham marriage.

There were other incidents of testimony used to bolster the credibility of Government witnesses or its case or to detract from witnesses favorable to Story. For example, Goldman and Sabo were shown their testimony before the Grand Jury for absolutely no reason (as, for example, to refresh their recollections). It was done simply to show the jury that they had previously testified accurately. In fact, Sabo was shown his testimony before a second Grand Jury concerning a case unrelated to Story's that had not ". . . come to trial yet." Jones' guilty plea to the conspiracy

was elicited 3 times. When done the third time and in response to the prosecutor's questions, Jones acknowledged pleading after speaking to his "hired" attorney "out of New York City" who was quite "experienced" but whom Jones could not say was "famous." Indeed, when Jones' direct commenced the prosecutor established over objection by way of "background" that Jones' "retained" (and not assigned by the Court) "New York City" attorney was referred to him by an attorney in Florida and by Story's attorney. Other similar conduct, all raised below, included the re-direct of Goldman, the cross of defense witnesses, including Story, and the exmaination of rebuttal witnesses were used improperly to either bolster the Government's case or detract from the defense.

The court below rejected Story's plain error argument. It noted that, although a prosecutor should use a less personal approach in the formulation of questions, it had held that an occasional use of personal rhetorical devices was fair argument, citing in support of the latter comment a case in which the personal devices was used solely in summation. In addition, the court below, citing the same case, believed that the prosecutor's behavior was not such as to create the risk that the jury may think the issue is whether he is truthful instead of whether the evidence is to be believed. It concluded that the conduct complained of was not such as to undermine the fairness of the trial and contribute to a miscarriage of justice.

ARGUMENT I

The Varied and Repeated Acts of Prosecutorial Misconduct caused Plain Error and Denied Petitioner a Fair Trial

There can be no question that it is error for a prosecutor to insert his credibility into a case whether done in questioning, *United States v. Puco*, 436 F.2d 761 (2d Cir. 1971), *cert. denied*, 414 U.S. 844 (1973), or in summation, *United States v. Young*, 470 U.S. 1 (1985). It is also error to argue that there is more to a defendant's crime than proved at trial, *United States v. Hernandez*, 750 F.2d 1256 (5th Cir. 1985); *United States v. Brown*,

451 F.2d 1231 (5th Cir. 1971), to misstate proof in summation, *United States v. Suarez*, 588 F.2d 352 (2d Cir. 1978), and to make an emotional appeal to the jury. *Berger v. United States*, 295 U.S. 78 (1935); *Darden v. Wainwright*, 477 U.S. 168 (1986). Repetitive examination on Jones' guilty plea to the conspiracy was also error, *United States v. Louis*, 814 F.2d 852 (2d Cir. 1987), as was the bolstering of the witnesses credibility by the accuracy of their prior Grand Jury testimony. *United States, v. Weil*, 561 F.2d 1109 (4th Cir. 1977); *Cooper v. Sowders*, 837 F.2d 284 (6th Cir, 1988).

In *United States v. Young*, *supra*, and later in *Darden v. Wainwright*, *supra*, the Court faced claims of prosecutorial misconduct that arose *solely* in summation. Several factors were considered in a determination of whether the effect or prejudice resulting from the misconduct caused plain error. They were: did the conduct respond to defense actions; did the trial court cure the misconduct with instructions; did the prosecutor's comments allude to facts outside the proof or misstate proof; did the misconduct implicate a specific right; and the weight of the evidence. The only factor not present here is that the misconduct did not implicate a specific right guaranteed Story.

All the other factors are present here. The prosecutor did not respond to defense actions with one exception. That was the comment made on the direct of Story's mother that was called for by defense counsel's question. But, the cross was overkill, *Darden v. Wainwright, supra* at 195 (J. Blackmun, dissenting), and was designed to enhance the prosecutor's personal standing with the jury. The trial court did instruct the jury that counsel's comments were not evidence. However, unlike *Young* and *Darden*, *supra*, the misconduct was not limited to summation. The "me" questions and the resulting testimony were in evidence as was the testimony that allowed the prosecutor to argue that there was more to Story's drug dealing than proved at trial. No instruction could remove that evidence and the resulting argument from the case. The summation also misstated proof and referred to facts not proved. There was also a strong emotional summation that appealed to one's baser instincts: money and wealth, sex and adultery.

In *Young* and *Darden*, *supra*, the proof was described as overwhelming and strong. The same can not be said here. The jury acquitted on one count that was supported, remarkably, by 3 witnesses. But, they were impeached and biased witnesses and were not supported by any independent trustworthy proof. Second, the conspiracy count also rested on credibility and the prosecutor improperly sought to enhance or detract from the credibility of those witnesses it viewed as either assisting or not assisting his case. And, third, the misconduct found its way into the jury during its deliberations. The jury re-heard all of Jones' testimony which had a significant amount of impeachment from the only unsworn witness - the prosecutor.

The misconduct was pervasive and occurred at all stages of the trial, including during the receipt of evidence. No other case has been found that contains the degree and extent of misconduct found here. To place it in perspective, the Court must consider the following. By the time the jury recieved Story's case to deliberate, it knew that the prosecutor was a local son, that his deceased father was a physican and both were close to Story's mother, that he had 14 years experience as a prosecutor, that he had interviewed witnesses and personally supported or detracted from their credibilty, that he believed the conspiracy was proved, that there was more to the conspiracy than was proved and that Story was a indecent, greedy, adulterous and rich exploiter of those who crossed his path. Plain error occurred.

II

The Trial Court erred in Precluding the Testimony of the Two Defense Witnesses on Rule 608(b) Grounds

The complete proof concerning Sabo's arrest on November 15 was admissible on the grounds of bias. Rule 608(b), Federal Rules of Evidence, did not bar the admission of the November 15 arrest on that theory and that theory was argued to the trial court. *United States v. James*, 609 F.2d 36 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980). Once admitted, the impeaching material - the possession of the "wire" - would also come into evidence. *United States v. James, supra.* The court below

acknowledged that bias did not bar the proof but it viewed the evidence too tenuous on that score.

The bias was, however, plainly evident. Sabo was working as a Government informant when arrested and attempted to use this position to undo his arrest or to obtain release from jail. He was firmly in the Government camp. Moreover, once received, the jury would hear the "wire" testimony of the arresting officers and could have concluded from it and from Sabo's denials on cross-examination of having a "wire" that the opposite was true. That is, he wore one when he twice met Story and did not give it to the police because it would support Story's testimony. *United States v. Philatelic Leasing Ltd.*, 601 F.Supp. 1554 (SDNY 1985), *affirmed*, 794 F.2d 781 (2d Cir. 1986).

CONCLUSION

The petitioner prays that this Court issue the writ of certiorari to review the judgment below for the foregoing reasons.

Dated: December 12, 1989

Respectfully submitted,
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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of October, one thousand nine hundred and eighty-nine.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE GEORGE C. PRATT,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

89-1206

v.

GEORGE STORY,
Defendant-Appellant,

MARK HENDRY, MARVIN LIGHTNER, and CURTIS JONES,
Defendants.

ORDER

George Story appeals from a judgment entered in the District Court for the Northern District of New York (Con. G. Cholakis, Judge) after a jury convicted him of conspiring to distribute in excess of one-half kilogram but less than five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (1982 & Supp. V 1987).

Story appeals his conviction on a number of grounds. First, his main assertion is that he was denied a fair trial by various acts of prosecutorial misconduct during the course of the trial. Second, he maintains that the District Court erred in refusing to allow him to call as a defense witness a police officer whose

testimony, he asserts, would have impeached the credibility and demonstrated the bias of the Government's main witness, Steven Sabo. Third, Story argues that the supplemental jury instructions regarding conspiracy were incorrect. Fourth, Story claims that a witness's testimony regarding Story's reputation for dishonesty was improperly admitted over his attorney's objection. Finally, Story alludes, without elaboration, to some other alleged defects in the trial, including insufficient proof with respect to what the indictment called the third "part" of the conspiracy. We have examined each of these arguments and find them to be without merit.

With respect to the alleged trial misconduct of the Assistant United States Attorney, Story concedes that his counsel failed to object to much of what occurred. *See* Appellant's Brief at 39, 49. Nevertheless, he maintains that the prosecutor's behavior was so flagrantly improper as to constitute plain error. We disagree. Although, with respect to the use of first person pronouns, we have cautioned prosecutors that "a less personal approach in the formulation of the questions would [be] preferable," *United States v. Puco*, 436 F.2d 761, at 764 (2d Cir. 1971), we have also said that "[o]ccasional use of such rhetorical devices is simply fair argument." *United States v. Modica*, 663 F.2d 1173, at 1181 (2d Cir. 1981). Especially in light of defense counsel's failure to voice a timely objection, the prosecutor's use of such pronouns and his references to prior conversations between himself and witnesses were not such as to "run the risk that the jury may think the issue is whether the prosecutor is truthful, instead of whether the evidence is to be believed." *Id.* The other aspects of the prosecutor's conduct that are complained about were not "such as to undermine the fundamental fairness of the trial and contribute to a miscarriage of justice." *United States v. Young*, 470 U.S. 1, at 16 (1985). Though it would have been more prudent for the prosecutor to have had a third person present when he interviewed the witness so that he could later frame his questions in terms of what the witness said to the third person, the failure to do so did not result in cross-examination that warrants reversal.

Story's second argument — that the trial court erred in refusing to allow Officer Caruso to testify as to the discovery of a recording device in Steven Sabo's car on November 15, 1987 — is also without merit. Although Story's brief suggests that such testimony would have allowed the jury to infer that Sabo had taped his November 12 and November 24 conversations with Story, this was not the ground for admission urged by counsel at trial. Rather, Officer Caruso's testimony was offered under Rule 608(b) to attack Sabo's credibility and to show bias. The rule does not permit extrinsic evidence and, in any event, the jury had several other grounds for questioning the credibility of the government's witness, who was admittedly a government informant and cocaine trafficker. Though the rule does not apply to bar extrinsic evidence to show bias, *see United States v. James*, 609 F.2d 36, 45-46 (2d Cir. 1979), *cert. denied*, 445 U.S. 905 (1980), the relation of the proferred evidence to bias was too tenuous to compel its introduction into evidence.

We have reviewed the notes submitted by the jury and the supplemental instructions and find no error by the trial judge. *United States v. DiBiasi*, 712 F.2d 785 (2d Cir.) *cert. denied*, 464 U.S. 962 (1983), on which appellant relies, involved a section 371 conspiracy, which requires an overt act. Section 846 conspiracies do not. *See United States v. Grammatikos*, 633 F.2d 1013, 1023 (2d Cir. 1980). In this case the Judge clearly instructed the jury that it had to find proof that the defendant entered into an agreement to further an illegal objective.

We have examined appellant's other arguments and conclude that they are also without merit. The judgment of the District Court is affirmed to the extent that it convicts appellant upon the jury's verdict; the validity of appellant's sentence remains pending before this Court on the Government's appeal in No. 89-1239.